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[DOI:10.5281/zenodo.14062689](https://doi.org/10.5281/zenodo.14062689)

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**Recommended Citation**

Dauer, F. (2024). EU accession to the Istanbul Convention, the proposal for a new Directive as an important step to combat international child abduction and domestic violence. *Yearbook of European Union and Comparative Law*, vol. 3, 267-315, Article 7

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**EU accession to the Istanbul Convention, the proposal for a new Directive as an important step to combat international child abduction and domestic violence**

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**Abstract:** The phenomenon of international child abduction requires specific help from international, European and national legislators. Mothers who are victims of domestic violence and violence of all kinds are a never-ending reality in recent years as an international phenomenon. The Regulation n. 606/2013 in combination with the Brussels I bis and Brussels II bis and ter regulations are now quite disappointing in practice or outdated given that the mechanism of Directive no. 2011/99/EU on the European protection order confirms applications that we have not actually seen in practice. The Istanbul Convention has recently been joined by the EU as well as the proposal for a Directive by the European Parliament for violence against women and family and domestic violence represents an orientation that guarantees greater protection for mothers who are victims of gender violence through the child return

procedure. The time is ripe to see how those steps will perhaps help the reality and how we will be able to address the problem in the coming years.

**Keywords:** protection of women; protection of human rights; child abduction; Istanbul Convention; domestic violence; protective measures; Regulation (EU) n. 606/2013; Directive 2011/99/EU; Brussels I bis; Brussels II bis; Brussels ter.

## Introduction

When talking about child abduction we mean of various nuances in the topic as well as the involvement of various sciences, not only legal ones. In recent years, many women who are victims of domestic violence by their partners have noticed a high level of international child abduction. This is a growing phenomenon that shows a difficult reality that calls on international, European and national legislators to perhaps take a new position on the subject (Dyer, 1978; Greif, Hegar, 1993; Beaumont, Mcleavy, 1999; Freeman, 2003; Lowe, Horosova, 2007; Browne, 2011; Lowe, 2011; Quillen, 2014; Hale, 2017; Lowe, Stephens, 2023)<sup>1</sup>.

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<sup>1</sup>See also in argument: the Eighth Meeting of the Special Commission (SC) on the practical operation of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Child Abduction Convention), October 2023: <https://www.hcch.net/en/publications-and-studies/details4/?pid=8488>; The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996 Child Protection Convention), 10-17 October 2023:

The discipline is based on the now old Hague Convention on international abduction of 1980 (Dyer, 1978), which punishes minors and above all violent husbands (Schuz, 2013; Freeman, Taylor, 2020)<sup>2</sup>.

At an international and European Union level, the best interest of the minor in terms of protection is notable but still there is a very important gap: no space is dedicated to forms of protection for mothers who are forced and living in a complex and perplexing reality (Freeman, Taylor, 2020).

Neither the Hague Convention nor at the European level have certainly adopted many binding acts<sup>3</sup> but the concerns about the

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<https://www.hcch.net/en/instruments/conventions/full-text/?cid=70;> Permanent Bureau, Domestic and Family Violence and the Article 13 “Grave Risk” Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper, May 2011: <https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf>; Permanent Bureau, Hague Conference on Private International Law, Conclusions & Recommendations (C&R), October 2023, p. 5: <https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf>. Permanent Bureau, Domestic and Family Violence and the article 13 “Grave Risk” Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: a Reflection Paper, Preliminary Document No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention: <https://assets.hcch.net/upload/wop/abduct2011pd09e.pdf>. p. 4ss.

<sup>2</sup>European Parliament Resolution, on the impact of intimate partner violence and custody rights on women and children, of 6 October 2021, in OJEU C 132/27 of 24 March 2022, letter. AC., “(...) the exposure of minors to domestic violence must be considered violence against minors; that children who are exposed to domestic violence experience negative mental and/or physical health consequences, which could be acute and chronic (...)”.

<sup>3</sup>Regulation (EC) no. 2201/2003 of the Council, of 27 November 2003, relating to jurisdiction, recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility, which repeals Regulation (EC) no. 1347/2000, of 27 November 2003, in OJ EU, L 338 of 23 December 2003, pp. 1-29. Council Regulation (EU) 2019/1111 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, and on international child abduction (recast), of 25 June 2019, in OJ EU L 178 of 2 July

mother who behaves as the perpetrator of the abduction and victim of violence have not only resolved the situation but are actually driving it to continue to increase (Trimmings, Momoh, Honorati, Dutta, Župan, 2020).

Within this general framework, we immediately notice the Hague Conference which allowed us to talk about a constant and precise interest in the phenomenon with the adoption of the Guide on Good Practices<sup>4</sup> which was drawn up in March 2020 (Weiner, 2000; Bruch, 2004; Shetty, Edelson, 2005; Hale, 2017; Reece, 2022)<sup>5</sup>.

The continuous daily existence of the phenomenon has influenced the interpreters of the convention who are oriented towards a conferral of a new element according to Art. 13, letter b), thus building a single tool that prevents the application of the automatic return mechanism (Zashin, 2021; Leann Heeter,

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2019, pp. 1-115.

<sup>4</sup>Hague Conference on Private International Law, Permanent Bureau, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part VI Article 13, Paragraph 1, Letter (b), The Hague, 2020: <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>; Hague Conference on Private International Law, Conclusions & Recommendations (Part II) Adopted By The Special Commission, The Hague, 2012, n. 81 and 82, pp. 1-2: <https://assets.hcch.net/docs/ff95d7b1-8396-4af1-9507-b44558a26e3c.pdf>

<sup>5</sup>Hale affirms that: "(...) the term "domestic violence" may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical, psychological and/or sexual; it may be directed towards the child ("child abuse") and/or towards an intimate partner (sometimes referred to as "spousal abuse" or "intimate partner violence") or other family members. This Paper uses the term "domestic violence", unless stated otherwise, in the broad sense outlined in this paragraph, and will be used interchangeably with the term "family violence (...)".

2022)<sup>6</sup>.

The Guide to Good Practices specified that:

“(...) the mere exposure of the minor to the violence suffered by his mother is not in itself sufficient to prevent his return under the Convention (Momoh, 2022; Schuz, Weiner, 2023)<sup>7</sup> (...) the concrete effect that this has on the life of the minor, which varies, depending on multiple factors such as the nature, frequency and intensity of the violence, as well as the circumstances in which such violence is likely to occur, in order to consider once the “well-founded risk” required by the exception is satisfied<sup>8</sup> (...) the threshold of “serious risk” required by the exception, the judge of the state of refuge will be required to order the return of the minor if he has ascertained the existence of adequate protection measures to ensure his protection once he returns (for intra-EU cases, see Art. 27, par. 3 of Regulation Brussels II ter) (...)” (Župan, Ledić, Drventić, 2019)<sup>9</sup>.

The lack of elaboration in the convention of European regulations takes into consideration phenomena of domestic violence which are oriented towards the coordination of a difference approaches between judicial authorities and the resolution of specific cases. The proposals to adopt a specific document on the topic have failed and the guide to good practice

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<sup>6</sup>United States Supreme Court, February 25, 2020, *Monasky v. Taglieri*, 140 S. Ct. 719, 724. Hague Conference on Private International Law, The Judges' Newsletter on International Child Protection, 2003, vol. V, 22ss: <https://assets.hcch.net/docs/ee6929b5-2244-4466-ad5a-6d2ccbd772e3.pdf>

<sup>7</sup>Hague Conference on Private International Law, Permanent Bureau, Guide to Good Practice, op. cit., p. 39.

<sup>8</sup>Hague Conference on Private International Law, Permanent Bureau, Guide to Good Practice, op. cit., p. 38ss.

<sup>9</sup>[https://e-justice.europa.eu/37842/FR/brussels\\_iib\\_Regulation\\_matrimonial\\_matters\\_and\\_matters\\_of\\_parental\\_responsibility\\_recast](https://e-justice.europa.eu/37842/FR/brussels_iib_Regulation_matrimonial_matters_and_matters_of_parental_responsibility_recast). See also in argument: Art. 7, lett. h). Hague Conference on Private International Law, Permanent Bureau, Guide to Good Practice, op. cit., p. 32 ss. EAPIL, Position Paper of the European Association of Private International Law, in response to the Hague Conference on Private International Law's Invitation to participate as an Observer in the Eight Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, 10 October 2023, 2ss: <https://eapil.org/wp-content/uploads/2023/10/EAPILPosition-Paper-in-view-of-the-8th-SC-on-the-1980-and-1996-Hague-Conventions.pdf>.

has emerged from the work of the judges which is sufficient. The same guide followed an interpretative path of a restrictive nature and oriented towards a condition preventing a well-founded risk (Browne, 2011).

The autonomous return mechanism in situations that existed even before the subtraction is not an easy way out. The immediate return of a minor taken from the mother who has suffered violence leads the mother herself to an even more difficult situation than the one she was already in. Because thus the mother finds herself faced with a problem. Her child enter to the state of habitual residence as a result of judge's decision. In such a case the child return alone to a violent father<sup>10</sup>.

### **EU tools regarding protection measures and cross-border recognition**

First of all, the EU has proposed a protection mechanism through two effective instruments, namely Regulation (EU) no. 606/2013<sup>11</sup> and Directive 2011/99/EU on the European

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<sup>10</sup>Hague Conference on Private International Law, Compilation of responses received to the January 2023 Questionnaire on the 1980 Child Abduction Convention of 28 June 2023. Preliminary Document n. 7, <https://assets.hcch.net/docs/c269681c-778a-4453-9316-9bbbf767fb32.pdf>, n. 43: “(...) are you aware of any cases in your state where a primary carer taking parent, for reasons of personal security (e.g., domestic or family violence, intimidation, coercive control, harassment, etc.) or others, has refused or has not been in a position to return with the child to the requesting state? How are such cases dealt with in your state? (...)”.

<sup>11</sup>Regulation (EU) no. 606/2013 of the European Parliament and of the Council, relating to the mutual recognition of protection measures in civil matters, of 12 June 2013, in OJ EU L 181 of 29 June 2013, pp. 4-12: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0606>

protection order<sup>12</sup>. In particular, the European protection order is related to the recognition and transposition of the relevant European protection orders that are issued by the national authorities of a Member State within the criminal proceedings framework. In other words these are orders that are transformed into a national protection measure of an equivalent nature.

The Regulation and the Directive attempt to strengthen the area of freedom, security and justice of the European Union, as well as to safeguard the freedom of movement of people within the borders of the EU according to Art. 3, par. 2 of the TEU and Art. 21, par. 1 TFEU (Blanke, Mangiamelli, 2021).

Persons who are holders of protection measures of a particular Member State are not prevented from moving and residing in other countries of the EU (Dutta, 2016; Etxebarria Estankona, 2019).

Therefore, these types of tools are not relevant and appropriate for victims of domestic violence but have a rather general character<sup>13</sup>.

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<sup>12</sup>Directive 2011/99/EU of the European Parliament and of the Council, on the European protection order, of 13 December 2011, in OJEU L 338 of 21 December 2011, pp. 2–18. The Regulation entered into force on 11 January 2015, the deadline for transposition of the Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0099>

<sup>13</sup>See the recital n. 6 of Regulation (EU) no. 606/2013, op. cit. “This Regulation should apply to protective measures ordered to protect a person where there are serious reasons to believe that his life, physical or mental integrity, personal freedom, safety or sexual integrity are in danger, for example to prevent any form of gender violence or violence in close relationships such as physical violence, harassment, sexual assault, stalking, intimidation or other indirect forms of coercion. It is important to underline that this Regulation applies to all victims, regardless of



The two types of tools also have goals in common. In fact, they aim to protect a person from acts and people that harm their life, protect his/her physical or mental integrity and personal freedom, safety and sexual integrity<sup>14</sup>. This is how the notion of protected person is used, i.e. the natural person as an object of protection who ensures the protection measure<sup>15</sup> thus including the related protection:

“(...) a) prohibition on frequenting certain localities, certain places or certain defined areas in which the protected person resides or frequents; b) prohibition or regulation of contacts, in any form, with the protected person, including by telephone, e-mail or ordinary mail, fax or otherwise; or c) prohibition or regulation of approaching the protected person within a defined perimeter (...)”<sup>16</sup>.

The instruments under analysis are not the same with the transnational recognition of the measure. In particular, the Regulation recognizes the automatic recognition of civil

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whether they are victims of gender-based violence. See also recital n. 9 of Directive 2011/99/EU cit., pursuant to which “it is important to underline that this Directive applies to protection measures aimed at protecting all victims and not just victims of gender violence, taking into account the specific characteristics of any type of crime concerned”.

<sup>14</sup>Recital no. 9 of Directive 2011/99/EU cit. is expressed in the following terms “(...) protection measures specifically aimed at protecting a person from acts of criminal relevance by another person such as to endanger, in any way, the life or physical, mental and sexual integrity of said person, for example by preventing harassment of any form, including harassment of the dignity or personal freedom of that person, for example by preventing kidnapping, stalking and other indirect forms of coercion, and which aim to prevent new criminal acts or reduce the consequences of acts previous criminals (...)”. According to recital n. 6 Regulation (EU) n. 606/2013, op. cit. “This Regulation should apply to protective measures ordered to protect a person where there are serious reasons to believe that his life, physical or mental integrity, personal freedom, safety or sexual integrity are in danger (...)”.

<sup>15</sup>See in particular Article 3, n. 2) of Regulation (EU) no. 606/2013, op. cit.; art. 2, no. 3) of Directive 2011/99/EU, op. cit.

<sup>16</sup>Article 3, n. 1), letter. a), b), c), Regulation (EU) no. 606/2013 cit.; art. 5, par. 1, letter. a), b) and c), Directive 2011/99/EU cit.

protection orders and the Directive introduces a special procedure that enters into the national criminal and protection order systems, which then is adopted by the Member States

The two instruments adopt civil and criminal objectives in order to provide greater protection<sup>17</sup>. In other words, the application of both the Regulation and the Directive depends exclusively on the measures that fall within the civil and criminal sphere. From a civil point of view, the Regulation follows the recognition procedure and from a criminal point of view the Directive with the transnational enforcement recognition procedure which is complex. What is surprising is that both the Regulation and the Directive do not offer a specific definition in civil and criminal matters (Skoutaris, 2022)<sup>18</sup>.

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<sup>17</sup>Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of protection measures in civil matters, of 18 May 2011, COM(2011) 276 final, p. 3: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0275:FIN:EN:PDF>: “(...) during the negotiations it emerged that the mechanism used in this instrument, based on Article 82 TFEU concerning mutual recognition in criminal matters, is not compatible with the ambitious level of mutual recognition already achieved in civil matters, based on Article 81 of the TFEU (...)”.

<sup>18</sup>CJEU, 11 April 2013, Sapir and others, C-645/11, ECLI:EU:C:2013:228, published in the electronic reports of the cases; 18 October 2011, Realchemie, C-406/09, ECLI:EU:C:2011:668, I-09773, par. 39; 15 February 2007, Lechouritou, C-292/05, ECLI:EU:C:2007:102, I-01519, par. 29. 28 April 2009, Apostolides, C-420/07, ECLI:EU:C:2009:271, I-03571, par. 43. 12 September 2013, Sunico and others, C-49/12, ECLI:EU:C:2013:231, published in the electronic reports of the cases, par. 33ss; 11 June 2015, Fahnenbrock and others, C-226/13, ECLI:EU:C:2015:383, published in the electronic Reports of the cases, par. 36; 21 October 2015, Gogova, C-215/15, ECLI:EU:C:2015:710, published in the electronic Reports of the cases par. 26, affirms that: “(...) the notion of “civil matters” should be understood in restrictive terms, including all requests, measures or decisions relating to “parental responsibility” pursuant to the Regulation itself, in accordance with the objective referred to in recital 5 of the latter (...) the notion of “civil matters” also included measures which, according to the national law of a state, had a public nature (...)”. 27 November 2007, C, C-435/06, ECLI:EU:C:2007:714, I-10141, parr. 41, 46

The Regulation limited itself to a clarification of the notion in civil matters which:

“(…) should be interpreted autonomously and the issuing authority should not be decisive for the purposes of assessing the civil character of a protection measure (…)” (Liakopoulos, 2019)<sup>19</sup>.

Thus the path of interpretation is based on a national law and is moved away from the autonomous interpretation of the Court of Justice of the European Union (CJEU) where it has not yet had the opportunity to rule on the matter. Thus the identification of a resolution criterion was left to the interpreter (Etxebarria Estankona, 2019). This is a solution where the intervention of the legislator continues to have critical and complex points. The wording of the Directive and the Regulation did not dedicate a rule on the discipline of the law that is applicable to the jurisdiction. The Regulation, therefore, contained an identification of the authorities and a jurisdiction that takes in

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and 51; 26 April 2012, Health Service Executive, C-92/12 PPU, ECLI:EU:C:2012:255, published in the electronic Reports of the cases, par. 60. See the conclusions of the Advocate General of 10 September 2013, Commission v. Parliament and Council, C-43/12, ECLI:EU:C:2013:534, published in the electronic Reports of the cases, par. 64: “(…) in this regard, I believe that the functional approach adopted by the European Court of Human Rights to define what falls under criminal matters in the framework of Article 6 of the European Convention for the Protection of Human Rights and fundamental freedoms, signed in Rome on 4 November 1950, can serve as a source of inspiration for defining the scope of application of Article 87 TFEU (…).” The conclusions of the Advocate General of 4 September 2014, C-260/13, ECLI:EU:C:2014:2166, published in the electronic Reports of the cases, par. 102.

<sup>19</sup>Recital n. 10 of Regulation (EU) no. 606/2013, cit.. Usually, in the criminal system, a criminal authority can also adopt civil protection measures. For the identification of the competent authorities, see European e-Justice Portal-Mutual recognition of protection measures in civil matters, [https://ejustice.europa.eu/content\\_mutual\\_recognition\\_of\\_protection\\_measures\\_in\\_civil\\_matters-352-it-it.do?init=true&member=1](https://ejustice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-it-it.do?init=true&member=1)

consideration the physical mental integrity and freedom of the person exposed to danger<sup>20</sup>.

The lack of a specific order to the jurisdiction determines the need for an appeal to Regulation Brussels I bis. It is connected with matrimonial matters and parental responsibility according to Regulation Brussels II ter. In this regard, reference is also made to Regulation Rome II which deals with extra-contractual obligations (Liakopoulos, 2019b)<sup>21</sup>, Regulation Rome III (Liakopoulos, 2019b)<sup>22</sup> regarding divorces, the 1996 Hague Convention<sup>23</sup> related to the protection of minors (Dutta, 2016) and Art. 3, par. 1 of Regulation (EU) no. 606/2013 which sought to identify the lex fori as applicable law according to protection measures in civil matters (Župan Poam, 2020; Hon Hein, 2022).

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<sup>20</sup>Art. 3 of the Proposal for a Regulation of the European Parliament and of the Council, relating to the mutual recognition of protection measures in civil matters, cit.

<sup>21</sup>Regulation (EC) no. 864/2007 of the European Parliament and of the Council, on the law applicable to non-contractual obligations, of 11 July 2007, in OJEU L 199 of 31 July 2007, pp. 40-49, (so-called Rome II).

<sup>22</sup>Regulation (EU) no. 1259/2010 of the Council, relating to the implementation of enhanced cooperation in the field of the law applicable to divorce and legal separation, of 20 December 2010, in OJEU L 343 of 29 December 2010, pp. 10-16, (so-called Rome III).

<sup>23</sup>1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Matters of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

**Regulation no. 606/2013 with the Brussels I and II bis and ter Regulations. Protection of mothers fleeing after domestic violence**

The lack of recognition relating to civil protection measures allows us to take into consideration the Regulation Brussels I bis and the Regulation Brussels II bis/ter. The measure of protection from the risk of domestic violence requires a family procedure in an autonomous and independent manner.

The general jurisdiction of the defendant's domicile as provided by the Regulation and Art. 4 (Liakopoulos, 2018)<sup>24</sup> highlights the special and alternative forums to the domicile criterion. The application of Art. 7, no. 2 of the Regulation qualifies the act of domestic violence as an unlawful act. Thus, the authority of the country of domicile of the defendant is competent with the jurisdiction, where the harmful event and/or the risk occurs<sup>25</sup>.

A flexible criterion is recognized which applies to the jurisdiction of every place the victim is located and regardless of their place of residence and the attacker's location. The judge of the state of refuge is competent to continue towards the issuance of a protection measure when the woman receives threats or

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<sup>24</sup>See art. 4, par. 1 of Regulation (EU) no. 1215/2012, op. cit., "(...) pursuant to this Regulation, persons domiciled in the territory of a given Member State are sued, regardless of their citizenship, before the jurisdictional authorities of that Member State (...)".

<sup>25</sup>See art. 7, no. 2 of the Regulation n. 1215/2012, op. cit., "(...) before the jurisdictional authority of the place where the harmful event occurred or may occur (...)".

intimidation via telephone and other IT means from her ex-partner.

The relevant measures are based on art. 7, no. 2 of the Regulation. As far as civil and commercial matters are concerned, a function is interpreted that affects the economic-financial profiles of the relevant relationship in court and which reconciles the protection measures of women who are victims of domestic violence<sup>26</sup>.

The use of Regulation Brussels I bis (Lazić, Mankowski, 2023) is combined with art. 7, no. 3 which recognizes the jurisdiction to adopt civil actions to the jurisdictional authority in the criminal action exercised (Liakopoulos, 2019a; Grolimund, Schnyder, 2022)<sup>27</sup>.

The relevant rule includes two conditions. The criminal proceedings that should be pending and the *lex fori* that allows the criminal judge to know the civil action that arises from the criminal offense. This does not constitute an application requirement and the jurisdiction of the criminal judge is vested in the civil action based on any criterion of the Regulation. Thus a criminal proceeding is established before a judge of a Member

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<sup>26</sup>CJEU, 28 April 2009, Apostolides, op. cit., par. 41; 15 May 2003, TIARD, C-266/01, ECLI:EU:C:2003:282, I-04867, parr. 20-21; 14 October 1976, LTU v. Eurocontrol, C-29/76, ECLI:EU:C:1976:137, I-01541, parr. 3-4.

<sup>27</sup>See Article 7, n. 3 of Regulation (EU) no. 1215/2012, op. cit., “(...) in the case of an action for compensation for damages or restitution arising from a criminal offence, before the jurisdictional authority in which the criminal action is brought, provided that according to its own law this jurisdictional authority can have jurisdiction over the civil action (...)”.

State that the national rules against the ex-partner is responsible for mistreatment and gender violence. In such a case, the criminal authority decides on possible actions of a civil nature, which are proposed by the victim, Art. 7, no. 3 of the Regulation.

According to Regulation Brussels I bis, the mother who is a victim of acts of domestic violence and at the same time the perpetrator of abduction obtains protection without guardianship. A protection is also guaranteed to her child by the Hague Convention and Regulation Brussels II ter.

The issuing of the civil protection order is based exclusively on the relationship between men and women. As regards the circulation of the order via the Regulation Brussels I bis and the Regulation n. 606/2013 there is a small difference in practice. Both have the objective of abolishing the exequatur procedure and issuing the certificate when the requirements are met. The latter are similar and the procedure of Regulation no. 606/2013 is detailed and quite protective (Liakopoulos, 2018)<sup>28</sup>.

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<sup>28</sup>As regards the differences between Regulation n. 606/2013 and Brussels I bis at least three points of reference can be noted. Regarding the issuing of the certificate in Regulation no. 606/2013 asks for the effect of the notification according to the measure of the person who determines the risk given that it is a measure that is ordered without hearing of another party. Thus the certificate is issued only if you have had the opportunity to contest the measure according to Art. 6, par. 1 and 6 of the Regulation. Instead, in Regulation Brussels I bis it is noted that the surprise effect is the recognition of execution of the measure and without prior notification to the person who was issued. Thus the instruments present themselves with differences in terms of duration and the certificate n. 606/2013 has fewer reasons to refuse and suspend the execution of the measure in the state in which it is requested and when the order complies with the Regulation. Instead, Regulation no. 1215/2012 according to art. 41 states in this regard that: “(...) the reasons for refusal or suspension of

As regards episodes of domestic violence in the context of family-based proceedings, i.e. separation, divorce, parental responsibility, international child abduction, it is important to resort to Regulation Brussels II ter. Therefore, there is no balance between Regulation Brussels II ter and Regulation n. 606/2013. In fact, an obstacle is evident in Art. 2, par. 3 given that a:

“(...) Regulation does not apply to protection measures that fall within the scope of application of Regulation (EC) no. 2201/2003 (...)”<sup>29</sup>.

This refers to Regulation Brussels II ter which replaced it<sup>30</sup>.

It was decided by the European legislator to avoid interference between the systems by considering Regulation Brussels II ter as a complete system with an autonomous function equipped with rules regarding jurisdiction, recognition and enforcement of decisions.

The recognition of Regulation Brussels II ter on Regulation n. 606/2013 notes many doubts. It is not clear why the legislator excluded the applicability of Regulation no. 606/2013 with respect to Regulation Brussels II ter and not Regulation Brussels I bis given that the latter is a complete and more rigorous system. On the other hand, Regulation n. 606/2013 is

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execution provided for by the law of the requested Member State apply to the extent that they are not incompatible with the reasons referred to in Article 45 (...)”.

<sup>29</sup>See the recital n. 11 of Regulation (EU) no. 606/2013, op. cit., “(...) this Regulation should not interfere with the functioning of Regulation (EC) no. 2201/2003, op. cit., Decisions adopted pursuant to Regulation Brussels II bis, cit., should continue to be recognized and enforced within its framework (...)”.

<sup>30</sup>Art. 104, of Regulation (EU) 2019/1111, op. cit., “References to the repealed Regulation are intended to be made to this Regulation (...)”.



established according to the jurisdiction that shows a restrictive interpretation. The jurisdiction excludes the operation of the Regulation in the majority of family matters and in cases of domestic violence since the measures are adopted for the prevention and protection of women.

As regards the previous Regulation Brussels II bis, the functional interpretation of Art. 2, par. 2 restricts the protection measures that are suitable for circulation according to the recognition of Regulation Bruxelles bis. However, it admits the applicability of Regulation n. 606/2013 when it comes to measures that concern family matters in general<sup>31</sup>.

This interpretative path is close to the new version of Regulation Brussels II ter. Differently from Regulation Brussels II bis and art. 20, it ensures the adoption of measures that are provisional and precautionary in relation to the people who are present in the state, that the legislative text has been introduced in a critical way in order to resolve interpretation matters (Trimmings, Momoh, 2021)<sup>32</sup>.

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<sup>31</sup>See the recital no. 11 of Regulation (EU) no. 606/2013, cit., according to which “(...) this Regulation should not interfere with the functioning of Regulation (EC) no. 2201/2003 (...)”.

<sup>32</sup>Regulation Brussels II bis in art. 20 states: “(...) 1. In cases of urgency, the provisions of this Regulation do not prevent the judicial authorities of a Member State from adopting the provisional or precautionary measures provided for by internal law, in relation to persons present in that state or to the assets located therein, even if, pursuant to this Regulation, the jurisdiction of another Member State has jurisdiction over the merits. 2. The measures adopted in implementation of paragraph 1 cease to be applicable when the judicial authority of the Member State competent under this Regulation to hear the merits has adopted the measures deemed appropriate (...)”. The Regulation n. 606/2013 which assigns transnationality to the measure and how it is

Art. 15 which replaces the previous Art. 20<sup>33</sup> and Art. 27, par. 5<sup>34</sup> deals with the subject of international abduction which recognizes that the non-competent state can provide provisional measures, including precautionary measures in cases of urgency and in respect of minors and of their assets<sup>35</sup>.

This formulation prevents the judges of the states of refuge and of the mother who is a victim of family violence and perpetrator of the abduction from being qualified as competent to introduce

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derogated from Regulation Brussels II bis and in consideration of the special circulation which is attributed to measures for the protection of women. The Regulation n. 606/2013 also refers in an “anomalous” way to the protection order which adopts a rule of an internal procedural nature which benefits the circulation regime as offered by Regulation no. 606/2013 when the procedural rule is activated according to Art. 20 of the Regulation Brussels II bis and the measure has limited effectiveness before the court presented.

<sup>33</sup>See also Annex X of Regulation (EU) 2019/1111, op. cit.: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111>

<sup>34</sup>Pursuant to Art. 27, par. 3 of Regulation (EU) 2019/1111, op. cit., “3. A court considering refusing to order the return of a child solely on the basis of the first paragraph of Article 13 of the 1980 Hague Convention may not refuse to order the return of the child if the party requests return convinces it by providing sufficient evidence or if the court itself is otherwise satisfied that adequate measures have been put in place to ensure the protection of the child after his return (...)”. The state of refuge before refusing the return of the minor has the obligation to verify the possibility that the country of return can collect the child and also to benefit from the appropriate measures. Already Art. 11, par. 4 of the Regulation n. 2201/2003, op. cit., did not include the needs of the victim mother in relation to domestic violence and the need for protection.

<sup>35</sup>Pursuant to Art. 15, par. 1 of Regulation (EU) 2019/1111, cit., “1. In urgent cases, even if the jurisdiction to hear the substance of the matter is recognized in the court of another Member State, the courts of a Member State are competent to order provisional measures, including precautionary measures, which may be provided by the law of that Member State in relation to: (a) a minor present in that Member State; or (b) to the assets of a minor located in that Member State (...)”; art. 27, par. 5 of Regulation (EU) 2019/1111, cit., “In ordering the return of the minor, the jurisdictional authority may, if appropriate, adopt provisional measures, including precautionary measures, pursuant to Article 15 of this Regulation at order to protect the minor from the serious risk referred to in Article 13, first paragraph, letter b) of the 1980 Hague Convention, provided that the examination and adoption of such measures do not unduly delay the return procedure (...)”.

protection measures. Judges adopt measures exclusively to protect minors and their property and the parent who is a victim of domestic violence. The protection of the parent who is a victim of violence is based exclusively on the Regulation Brussels I bis. The perplexity and its extension forces the parent to initiate the procedure with costs and time.

Articles 15 and 27, par. 5 are subject to a functional interpretation with the aim of guaranteeing the substantial protection of the minor. Domestic violence against the mother affects the parenting skills and well-being of the child who thus becomes an indirect victim.

Art. 15 recalls Art. 27, par. 5 to the protection of the minor. These rules adopt urgent and precautionary measures towards mothers, who are victims of domestic violence taking into account their age and the way in which the violence was perpetrated<sup>36</sup>. Art. 2, par. 3 of Regulation n. 606/2013 limits the exclusively scope of protection measures. In fact, it circulates the rules of recognition of enforcement, which are established according to the Regulation Brussels II bis and Art. 15 of Regulation Brussels II ter guaranteeing a substantial protection of the minor who implements the protection of the mother and the application of all these instruments in a cumulative manner

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<sup>36</sup>Hague Conference on Private International Law, Compilation of responses received to the January 2023 Questionnaire on the 1980 Child Abduction Convention, op. cit.,: “(...) would the authorities of your state consider putting in place measures to protect the primary carer upon return in the requesting state if they were requested as a means to secure the safe return of the child? (...)”, pp. 267-271.

despite the impediment of Art. 2, par. 1, letter. b) of the Regulation, which includes the notion of decision and provisional and precautionary measures according to Chapter IV of the recognition and execution of the Regulation itself (Trimmings, Momoh, 2021; Trimmings, 2022; Honorati, 2023)<sup>37</sup>.

The interpretative nature of the protection of the mother as a victim of domestic violence and perpetrator of child abduction is very broad and nuanced. The form of protection is linked to the interpretation of Art. 15 of Regulation 2019/1111 and its own formulation which eliminates the concept of persons while the Regulation n. 606/2013 remains ineffective.

Doubts about the applicative extension of Regulation no. 1215/2012 and the protection measures as well as the procedure that excludes the relationship between the two partners without

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<sup>37</sup>See the recital 30 of the Regulation (UE) 2019/1111, cit., “(...) should not prevent the courts of a Member State which do not have jurisdiction to hear the substance from adopting, in cases of urgency, provisional measures, including precautionary measures, relating to the person or property of a minor present in that State Member. Such measures should not be recognized or enforced in any other Member State under this Regulation, with the exception of measures taken to protect the child from serious risk referred to in Article 13, first paragraph, letter b) of the Hague Convention of 1980. The measures taken to protect the child from that risk should remain in force until a court of the Member State of the child's habitual residence takes such measures as it deems appropriate. Where the protection of the best interests of the minor makes it necessary, the court should communicate, directly or through the central authorities, the measures adopted to the court of the Member State competent to hear the merits pursuant to this Regulation. However, failure to provide such information should not in itself constitute a reason for non-recognition of the provision (...).” EAPIL, Position Paper of the European Association of Private International Law, in response to the Hague Conference on Private International Law's Invitation to participate as an Observer in the Eight Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, op. cit., p. 9 ss.

connection to the protection of the mother and the child, are noted.

Directive 2011/99/EU according to the most stringent mechanisms comply with Regulation n. 606/2013. And for the issuing of a European Protection Order (EPO) the woman expresses her intention to relocate indicating the moment that she intends to settle. Thus, a recognition mechanism is envisaged where the state receiving the relevant EPO issues a national measure which is equivalent and which benefits from the margins of refusal of recognition provided for by the Regulation itself (Dutta, 2016; Tertsch, 2022).

However, a system that certainly puts the Regulation on a more effective path is confirmed by the continuous and high number of EPOs that are issued every year<sup>38</sup>.

### **The fight against gender violence and domestic violence according to the Istanbul Convention**

The growth in episodes of violence at a national and international level and all the negative consequences that they cause even indirectly<sup>39</sup> towards victims and minor witnesses as

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<sup>38</sup>Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order of 11 May 2020, COM/2020/187 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A187%3AFIN>

<sup>39</sup><https://eige.europa.eu/gender-equality-index/2022/domain/violence> and the relevant study entitled: “EU survey on gender-based violence against women and other forms of inter-personal violence (EU-GBV)-first results”. EU survey on gender-

well as in acts of mistreatment offer us the way to adopt acts of greater protection for women and children who find themselves in similar situations (Simonovic, 2014; Mole, 2023)<sup>40</sup>.

The Istanbul Convention organized by the Council of Europe and the EU<sup>41</sup> as well as the independent group of experts “on action against violence against women and domestic violence” (GREVIO) and the Committee of the Parties as a political body, which is composed of official representatives of the states party to the Convention have the objective of controlling and monitoring the provisions between the adhering states.

The accession of the convention to the EU and the opinion of the CJEU (Koutrakos, 2022)<sup>42</sup> concluded in June of 2023 and the entry of the convention into force on 1st October<sup>43</sup> as well as

based violence against women and other forms of inter-personal violence (EU-GBV)-first results-2022 edition, Luxembourg 2022, <https://ec.europa.eu/eurostat/web/products-statistical-reports/w/ks-ft-22-005>

<sup>40</sup>See also in argument: UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 12: Violence against women, 1989: <https://www.refworld.org/docid/52d927444.html>; UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 2017: <https://www.ohchr.org/en/treaty-bodies/cedaw/general-recommendations>; UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation General Recommendation No. 19: Violence against women, 1992: <https://www.refworld.org/docid/52d920c54.html>

<sup>41</sup>Council of Europe, Convention on preventing and combating violence against women and domestic violence, Chart of signatures and ratifications of Treaty 210, CETS No. 210: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=210>

<sup>42</sup>CJEU, order of 6 October 2021, Avis 1/19, not yet published.

<sup>43</sup>Council Decision (EU) 2023/1075 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence as regards institutions and the public administration of the Union, of 1 June 2023, in OJEU L 1431 of 2 June 2023, pp. 1-3:

its own ratification was a priority for the strategy for equality of gender 2020-2025 and the European Commission<sup>44</sup>.

Accession in this case is not a political act given that the Union is called upon to align the regulations and obligations of the following convention within the Member States exclusively and according to the competences attributed to them by the relevant treaties (Burke, Molitorisova, 2019).

In this way, the states that have not ratified the convention are required to adapt it in light of the secondary legislation of the Union. The Union has adhered to the agreement in an exclusive manner and in the matters of exclusive competence, to the extent that the provisions of the agreement affect common rules according to Art. 3, par. 2 TFEU (Blanke, Mangiamelli, 2021).

Member States have competence where the convention does not interfere with common rules and does not change its scope. The Union is responsible for the implementation of the provisions of

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<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32023D1075>; Council Decision (EU) 2023/1076 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence as regards judicial cooperation in criminal matters, asylum and non-refoulement, of 1 June 2023, in OJEU L 1431 of 2 June 2023, pp. 4-6: <https://eur-lex.europa.eu/eli/dec/2023/1076/oj>; Council of Europe, Reservations and Declarations for Treaty No.210, Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS N. 210, <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=210&codeNature=10&codePays=1>

<sup>44</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: the Gender Equality Strategy 2020-2025, of 20 March 2020, COM/2020/152 final: <https://www.eea.europa.eu/policy-documents/communication-from-the-commission-to-1>

the convention and in the sectors for which it has exclusive competence.

The Member States have ratified and implement the provisions of the convention which fall within the sectors of their national competence.

The extension of the competence of the Union is necessary for the analysis of the relationship between the convention and the acts of the EU<sup>45</sup>.

Already in the declaration of accession to the convention the Union has prepared a list of acts which are involved. The list of acts will be updated in time<sup>46</sup>.

The situation of the Member States that are not parties to the convention remains altered.

The Council of Europe has, thus, created an international instrument that is binding on the definition of domestic violence<sup>47</sup>. The Convention includes provisions that are detailed

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<sup>45</sup>Council Decision (EU) 2023/1075, op. cit.: “(...) on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence in relation to the institutions and public administration of the Union (...)”, parr.5-7; Council Decision (EU) 2023/1076 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence as regards judicial cooperation in criminal matters, asylum and non-refoulement, op. cit., parr. 5-7; Council of Europe, Reservations and Declarations for Treaty No. 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, op. cit., arr. 4-6.

<sup>46</sup>Reservations and Declarations for Treaty No. 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, op. cit.

<sup>47</sup>When we talk about “domestic violence” the conventional text (art. 3, letter b)) states that it refers to: “(...) all acts of physical, sexual, psychological or economic violence that occur within the family or nuclear family or between current or former



and are part of measures that prevent incidents of violence, protect victims and prosecute perpetrators (Simonovic, 2014). Its primary objective is a comprehensive framework of protection measures and policies for victims of violence, including domestic violence. The content of international obligations to states is part of Art. 5 (states obligations and due diligence). Thus a general duty emerges that extends to national bodies to introduce acts that directly or indirectly cause violence against women as well as the obligation to adopt measures that are legislative and necessary to diligently exercise prevention, investigation and punishment of perpetrators as well as the related compensation of victims for acts committed by private individuals (Niemi, Peroni, Stoyanova, 2020; Stoyanova, 2020).

### **Fight against women and gender violence through the proposed Directive of the Union**

The EU has expressed its need for fundamental priorities and the predisposition for an apparatus that addresses violence against women. We speak for the gender equality 2020-2025 strategy<sup>48</sup>,

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spouses or partners, regardless of whether the perpetrator of such acts shares or has shared the same residence with the victim (...)”. This is a notion that refers to the female gender. The decision according to Art. 2, par. 1 and 2 is the result of two opposing opinions within the drafting groups of the convention. The majority maintains that the adoption of this instrument focuses on the forms of violence perpetrated against women and the minority supports the adoption of domestic violence which takes into consideration all forms of domestic violence.

<sup>48</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of equality: the strategy for gender equality 2020-2025, op. cit.

which presents different lines of action, such as the prevention of forms of violence, protection of victims, punishment of perpetrators of crimes, implementation of global policies and coordination (Nogaj, 2013; Walby, Olive, 2013)<sup>49</sup>.

The continuous violence against women and as a consequence the violation of human rights at a global level<sup>50</sup> continuously causes episodes of violence against women which are intensified especially after the covid-19 pandemic. These are victims who are oriented towards isolation and have restricted possibility of contacting centers that provide protection and assistance<sup>51</sup>.

The proposal for a Directive with certain objectives represents a valid alternative which is intended to achieve protection at a common level between Member States by filling national gaps

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<sup>49</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on the European Pillar of Social Rights, of 4 March 2021, COM/2021/102:<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A102%3AFIN>; European Parliament Resolution of 14 December 2021, with recommendations to the Commission on combating gender-based violence: online violence, 2020/2035 (INL): [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0489\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0489_EN.html); Resolution of the European Parliament, containing recommendations to the Commission regarding the identification of gender violence as a new sphere of crime among those listed in Article 83, paragraph 1, TFEU, of 16 September 2021, 2021/2035(INL): [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0388\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0388_EN.html)

<sup>50</sup>European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results report, 2014: <https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>

<sup>51</sup>UN Women, Measuring the Shadow Pandemic: Violence against Women during COVID-19, 2021: <https://data.unwomen.org/sites/default/files/documents/Publications/Measuring-shadow-pandemic.pdf>. European Parliament resolution, on the gender perspective in the COVID-19 crisis and the post-crisis period, of 21 January 2021, 2020/2121(INI).

and especially in states not adhering to the convention (Picchi, 2022)<sup>52</sup>.

The EC on 8 March 2022 proposed a Directive to the European Parliament and the Council on combating violence against women and domestic violence. The objective is the adoption of legislative actions that are common and set minimum standards as guidance towards violence against women. The proposal was based on Articles 82, par. 2 and 83, par. 1 TFEU (Blanke, Mangiamelli, 2021). In particular, Art. 83, par. 1 TFEU is the legal basis for the issuing of minimum standards relating to crimes and sanctions that fall within the sphere of crime for the sexual exploitation of women and minors.

The EC condemns all forms of abuse, actual and attempted conditions of vulnerability to an imbalance of power and trust as boundaries of the monetary, political or social advantages that arise from the sexual act of another person<sup>53</sup>.

Instead Art. 82, par. 2 TFEU is the legal basis for minimum standards concerning the rights of victims of crime by facilitating mutual recognition of judicial decisions and police and judicial cooperation in criminal matters having a

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<sup>52</sup>Proposal for a Directive of the European Parliament and of the Council, on combating violence against women and domestic violence, of 8 March 2022, COM/2022/105 final:  
[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066(COD)&l=en)

<sup>53</sup>Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, op. cit., p. 9.

transnational dimension.

The proposal introduces new minimum standards to strengthen victims' access to justice as well as their rights to adequate protection. The assessment of individual needs as well as the protection and assistance to victims that is adapted to specific situations and the issuing of urgent measures that distance themselves from protection orders are the main matters of the proposed directive.

This encourages a strengthening of cooperation at national and EU level with a different approach. An approach that attempts measures to protect the commission of violence through actions that raise awareness, the training of experts as well as investigations that identify the perpetrators of the crimes and their subjection to related programs.

There are, also, minimum rules relating to the compensation of the perpetrator of the crime and the removal of harmful content from the internet on the possibilities of pursuing an appeal (Rigotti, McGlynn, 2022).

### **Proposal for a new Directive, Istanbul Convention and international child abduction within the EU**

As we understood from the previous paragraphs, the proposed Directive relating to the fight and violence against women and domestic violence was based on some very important

assumptions, such as domestic violence against women and family violence, that were addressed in the respective legislation and policies of Member States and within the EU direct legal instruments relating to the protection as well as the monitoring of data translated according to the expected results<sup>54</sup>.

As regards the Istanbul Convention (De Vido, Frulli, 2023) it has constituted a legislative reform at a national level in the states that are appealed to, where the relative control and monitoring of its application has shown that it has some gaps<sup>55</sup>.

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<sup>54</sup>Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, cit., pp. 3-4 and 10. Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, assistance and protection of victims of crime, and replacing Framework Decision 2001/220/JHA of 25 October 2002, in OJEU L 315 of 14 November 2012, pp. 57-73: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>; Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA of 13 December 2003, in OJEU L 335 of 17 December 2011, pp. 1-14: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0093>; Council Directive 2004/80/EC on the compensation of crime victims, of 29 April 2004, in OJ L 261 of 6 August 2004, pp. 3-6: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0080> Regulation no. 606/2013 and Directive 2011/99/EU also refers to this catalogue which completes the protection measures. These tools are developed to protect women who are victims of violence and perpetrators of international abduction by playing a role towards this type of category. Its effectiveness has a defect in the criterion of distinguishing civil from criminal matters in the discipline of applicable law and jurisdiction. Regulation n. 606/2013 tries to provide a coordination solution between the regulations that provide for Regulation Brussels I bis and Regulation Brussels II ter. Thus Regulation no. 606/2013 is established and enforced as indispensable. Directive 2011/99/EU presents the related procedure for adopting the order as a complex recognition that has not found application within the EU in practice.

<sup>55</sup>Council of Europe, 10 years of the Istanbul Convention, <https://www.coe.int/en/web/istanbul-convention/10th-anniversary>; Council of Europe, Secretariat of the Monitoring Mechanism of the Council of Europe Convention on preventing and combating violence against women and domestic violence, First General Report on the activities of GREVIO, June 2015 to May 2019, March 2021: <https://www.coe.int/en/web/istanbul-convention/grevio>

In the legal context which appears fragmented at the level of the EU, the multiplicity of various approaches at the national level and the purpose of the EC has allowed us to speak for an all-encompassing system which benefits the category of victims and which is based on an introduction of minimum standards rules that are direct and ensure equal treatment across the EU<sup>56</sup>.

In particular, the proposal aimed to contribute to violence against women and to increase the relative trust in the judicial systems of individual Member States. This establishes towards the Directive a related trust which favors the mutual recognition of sentences and national decisions, thus improving cooperation in the criminal field between Member States<sup>57</sup>.

Equal treatment of women victims of violence within the borders of the EU and the growth of mutual trust between Member States and their respective judicial systems by adding the accession of the EU to the Istanbul Convention open a positive impact on international law private sector of the EU and especially in the field of child abduction which is connected with women victims of family violence (Mcquigg, 2019).

In particular, recital six of the Directive proposal provided:

“(...) due to their vulnerability, minors who witness acts of violence against women or domestic violence suffer direct emotional and psychological damage that affects their development. These minors should therefore be

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<sup>56</sup>Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, op. cit., p. 10.

<sup>57</sup>Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, op. cit., p. 3.

considered victims themselves and benefit from targeted protection measures, to which Parliament adds in its version (...) this is of particular importance when considering custody and visit rights (...)”<sup>58</sup>.

This formulation is based on two provisions that the Istanbul Convention has dedicated to minors. The first part of the rule is oriented towards Art. 26 of the convention which states:

“(...) the parties shall adopt the legislative and other measures necessary to ensure that the rights and needs of children are duly taken into consideration in the context of protection and support services for victims witnesses of any form of violence falling within the scope of this Convention (...) take legislative or other measures necessary to ensure that, when determining custody and access rights of children, incidents of violence are taken into account violence falling within the scope of this Convention (...)”<sup>59</sup>.

The competent authorities take into consideration cases of violence that comes within the scope of application of the convention on the part of men, fathers of the family. In particular, Art. 31, as we have seen, takes into consideration not only the violence which sees the minor as a victim but also the related “incidents of violence against the non-abusive carer”<sup>60</sup> which are part of the episodes every time they determine custody and visitation rights.

Art. 31 has an active role for the competent authorities who leave no clues to pursue and/or initiate investigations that are suspicious in nature<sup>61</sup>.

<sup>58</sup>Draft Legislative Resolution of the European Parliament on the proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, op. cit.

<sup>59</sup>Art. 31, par. 1.

<sup>60</sup>Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, of 11 May 2011, n. 175: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>

<sup>61</sup>WAVE, The protection of children from violence in the context of intimate partner violence/domestic violence and custody and visitation. In light of the

The proposal, which is dedicated to the entire Chapter III, relating to the protection of victims and access to justice, requires Member States to equip themselves with personnel and services that are responsible for qualified control and equipped with investigative tools, effective where cases of violence against women and domestic violence are dealt with promptly and scrupulously<sup>62</sup>.

The drafters of the convention follow the nature and exposure of acts of violence of an indirect nature which thus affect the growth of minors. Witnessing episodes of violence against the mother causes the lives of children, thus highlighting what was foreseen and proposed by the European Parliament through the Resolution of 2021 on the impact of intimate partner violence and custody rights on women and children<sup>63</sup>.

The criminal proceedings established the separation between parents and custody of the minor in a parallel manner. Within this context, joint custody and the granting of visitation rights to the father constitutes the basis that follows the decisions of the

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international normative framework, with special attention to the Council of Europe's Istanbul Convention, 2022, p. 18: <https://wave-network.org/wave-child-custody-and-visitation-rights-paper-2022/>

<sup>62</sup>Chapter III in general and art. 17 in particular of the proposal for a Directive of the European Parliament and of the Council, on the fight against violence against women and domestic violence, op. cit.

<sup>63</sup>European Parliament resolution, on the impact of intimate partner violence and custody rights on women and children, of 6 October 2021, 2019/2166(INI): [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0406\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0406_EN.html)



judges. Regimes that impose on judicial bodies the risk of endangering the child and the mother. A mother who continues to be exposed to the relative risk of violence from her ex-partner and as a consequence have a negative impact on the life of the minor<sup>64</sup>.

The European Parliament via the resolution of 2021 stated that:

“(...) in cases of intimate partner violence, the right of women and children to be protected and to live a life free from physical and psychological violence should prevail over the preference for shared custody”<sup>65</sup>.

The judge competent for the custody judgment could therefore deem it appropriate to suspend the proceedings until the investigations have achieved concrete results<sup>66</sup>. The revocation

<sup>64</sup>Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, op. cit., n. 176; European Parliament resolution, on the impact of intimate partner violence and custody rights on women and children, op. cit.; WAVE, The protection of children from violence in the context of intimate partner violence/domestic violence and custody and visitation, op. cit., pp. 12 and 18.

<sup>65</sup>Resolution of the European Parliament, on the impact of intimate partner violence and custody rights on women and children, cit., where par. AA and 3 states that: “(...) the minor and the request for shared custody are often manipulated by the parent violent to maintain contact with the mother following the separation; (...) perpetrators often mistreat minors or threaten to harm them or take them away from their partners and ex-partners in order to cause harm to the latter, which has serious repercussions on the harmonious development of the minor (...)”.

<sup>66</sup>European Parliament resolution, on the impact of intimate partner violence and custody rights on women and children, op. cit., par. 9, “(...) shared custody and unsupervised visits are desirable in order to ensure that parents enjoy equal rights and responsibilities, unless this is contrary to the best interests of the child; (...) the automatic attribution by law of parental responsibility to one or both parents is contrary to the best interests of the minor; (...); violence by a partner is clearly incompatible with the best interests of the minor and with shared custody and care, (...); the protection of women and children from violence and the best interests of the child must be of primary importance and should prevail over other criteria”. On the suspension of proceedings and the methods of obtaining evidence, the European Parliament Resolution, on the impact of intimate partner violence and custody rights on women and children, cit., point 32 “urges to postpone decisions on the joint custody until the domestic violence has been adequately investigated and a risk assessment has been conducted (...)”. See also, par. 24 of the European Parliament

of the rights of custody and visitation of the violent partner and the attribution of sole custody to the mother, if she has been a victim of violence, may represent the only way to prevent further violence and secondary victimization of the victims<sup>67</sup>.

Continuing with Art. 31, par. 2 of the Convention:

“(...) the parties shall take the necessary legislative or other measures to ensure that the exercise of rights of access or custody of children does not compromise the rights and safety of the victim or children (...)”.

Within this context, the GREVIO Report of February 2022 (Wojciech, 2022) took into account the judgments relating to the custody of access rights to the minor<sup>68</sup>. It invited Member States to take action in time and to adapt their legislation to the provisions of the convention<sup>69</sup>.

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Resolution, on the impact of intimate partner violence and custody rights on women and children which states: “(...) the child must, in particular, have the opportunity to be heard, which is essential to determine what is in your best interests when examining family custody and custody cases, depending on your age and maturity (...)”.

<sup>67</sup>European Parliament resolution, on the impact of intimate partner violence and custody rights on women and children, op. cit., par. 9; Council of Europe, GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports, February 2022, par. 176: <https://rm.coe.int/prems-010522-gbr-grevio-mid-term-horizontal-review-rev-february-2022/1680a58499>: “(...) in particular in cases of domestic violence, issues regarding common children are often the only ties that remain between victim and perpetrator. For many victims and their children, complying with contact orders can present a serious safety risk because it often means meeting the perpetrator face-to-face. Hence, this paragraph lays out the obligation to ensure that victims and their children remain safe from any further harm (...)”.

<sup>68</sup>Council of Europe, GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports, op. cit., par. 327.

<sup>69</sup>Council of Europe, GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports, op. cit., par. 327. In any case, GREVIO has noted that some states such as Andorra, Austria, Finland, France, the Netherlands, Portugal, Spain and Sweden have a provision of this type of nature and it is not applied in practice.

The same report confirmed that national legislation does not take into consideration the damage caused to the child and the exposure of one parent's violence towards the other. The national authorities are inclined to insert a rule that establishes the violation of the best interests of the child in cases of witnessed violence<sup>70</sup>.

In the majority of states, the prevalence of the right of two-parenthood over the right is growing in a non-violent environment. The custody and visitation rights of a violent parent are preserved and based on the consideration of forced, violent episodes that lay the foundations for an issue uniquely relating to the relationships between parents if the criminal proceedings ended with the conviction of the father<sup>71</sup>.

This is an unreasonable orientation that favors shared custody and the granting of visitation rights that are in conflict with what is provided for by the United Nations Convention on the Rights of the Child (so-called New York Convention)<sup>72</sup> in relation to the right to two-parenthood. This convention provides the

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<sup>70</sup>Council of Europe, GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports, op. cit., par. 327.

<sup>71</sup>Council of Europe, GREVIO, Mid-term Horizontal Review of GREVIO baseline evaluation reports, op. cit., par. 329. See also from the ECtHR the case of 10 November 2022, n. 25426/20, I.M. and others v. Italy.

<sup>72</sup>Convention on the Rights of the Child, of 20 November 1989, (so-called New York Convention):  
<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

minor's right to maintain personal relationships and contacts that are direct with both parents and according to Art. 9, par. 3, “except if it is contrary to the child’s best interests”<sup>73</sup>. The right to two parents is a relative right that yields the respect of others. The right of children to grow up in a non-violent environment is a fundamental right. The contracting parties to the New York Convention undertake all necessary measures to protect every child from all forms of violence according to Art. 19, par. 1 (Vandenhoe, Türkelli, Lelmbrechts, 2019; Kilkelly, Liefwaard, 2020)<sup>74</sup>.

The resolution of the European Parliament states, in this regard:

“(...) the failure to address intimate partner violence in decisions relating to custody rights and visits is a negligent violation of the human rights to life, to a life free of violence and the healthy development of women and minors (...)”<sup>75</sup>.

This is an opening orientation that contributes to the Hague Convention on international child abduction and does not present ad hoc provisions for the cases of female victims of domestic violence who are committing the abduction and

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<sup>73</sup>Article 9, par. 3 Convention on the Rights of the Child, op. cit.

<sup>74</sup>See Art. 19, par. 1 of the Convention on the Rights of the Child: “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (...)”.

<sup>75</sup>European Parliament resolution, on the impact of intimate partner violence and custody rights on women and children, op. cit., par. 10 which continues “(...) any form of violence, including witnessing episodes of violence in towards a parent or a close person, is considered in law and practice to be a violation of human rights and an act contrary to the best interests of the minor (...)”.

everything that this notion includes.

The existing instruments in EU law demonstrate a certain inability towards the protection of victims of domestic violence, in family proceedings and towards an interpretative effort by the legal practitioner.

The absence of an ad hoc protection favors the accession of the EU to the Istanbul Convention where together with the proposed Directive it leads to a change. The provision of domestic violence relating to the abduction of minors is reconstructed according to Art. 31, par. 2 of the Convention:

“(...) parties shall take the necessary legislative or other measures to ensure that the exercise of rights of access or custody of children does not compromise the rights and safety of the victim or children (...)” (Vandenhoe, Türkelli, Lelmbrechts, 2019).

Thus the right to two parents necessarily gives way in favor of the right to the minor who lives in an environment that is no longer violent. Within the borders of the EU, this rule takes into account the countries involved, both the country of habitual residence and the country of refuge (Ruiz Sutil, 2018).

It is evident that an extreme consequence is noted, i.e. the opportunity of the principle of mutual collaboration between Member States, which the jurisdictional authority of the country of previous residence where episodes of domestic violence are confirmed declines according to Art. 31, par. 2 of the competence that regulates relationships in custody in favor of the state of refuge. This position has as a consequence an

important change in the conception of the mechanisms of the Hague Convention of 1980 as well as the principle of mutual trust between Member States in favor of the minor in cases of gender violence (Ruiz Sutil, 2018).

Within the scope of the EU, the implementation of the Convention of Istanbul and the Directive guarantees equal treatment of women among Member States. Even before Art. 31, par. 2 is applied, with an impediment to an automatic return of the child according to the principle of mutual trust as well as equal treatment, it is noted that the escape of women perpetrators of abduction can be reduced to a path that benefits a minimum level of protection that transposes to the States Members according to the proposal of the Directive of the EU.

Article 31, par. 2 assumes an exceptional role in the obligation to return as an impeding condition which calls for the international abduction of minors from female victims who suffer violence in their own homes.

Adhering to the Istanbul Convention by the EU as well as the proposed Directive produces a positive impact on the instruments that recognize the transnationality of protection measures. Within the scope of the EU, the provisions of the Istanbul Convention and the matters of its exclusive competence are conformed to the extent that the provisions of the convention affect common rules that modify according to Art. 3, par. 2

TFEU the list of legal acts that derive from and adapt the contractual obligations. Thus the Union indicates that Regulation n. 606/2013 and Directive 2011/99/EU are steps forward in the protection of minors.

The proposal of the Directive already declares that it does not put these two tools in the second line<sup>76</sup> as the proposal that leads the Member States and the competent authorities to inform the victims about the possibility of requesting urgent measures and:

“(...) request the cross-border recognition of protection measures pursuant to Directive 2011/99/EU and Regulation (EU) no. 606/2013 (...)”<sup>77</sup>.

The EU compliant with the convention and its resulting legal acts highlights the provisions that are dedicated to the protection of women<sup>78</sup> as well as at the level of international cooperation<sup>79</sup>.

Already Art. 50 of the Istanbul Convention states that:

“(...) the parties shall adopt the legislative and other measures necessary in order to offer “adequate and immediate protection to victims” and art. 62 provides for cooperation between states in order to “a) prevent, combat and prosecute all forms of violence (...) b) protect and assist victims (...)”.

The Regulation n. 606/2013 and Directive 2011/99/EU are subjects to a review procedure, i.e. a necessary measure which concretely guarantees the obligations arising from the convention and which provide substantial protection for the

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<sup>76</sup>Art. 48 of the Proposal for a Directive of the European Parliament and of the Council, on the fight against violence against women and domestic violence, op. cit.

<sup>77</sup>Art. 21 of the Proposal for a Directive of the European Parliament and of the Council, on combating violence against women and domestic violence, op. cit.

<sup>78</sup>Chapter IV-Protection and support, art. 18 “general obligations”; Chapter VI: Investigations, criminal proceedings, procedural law and protective measures, art. 50 “Immediate response, prevention and protection” and art. 53 “Orders of injunction or protection”; art. 56 “Protection measures”.

<sup>79</sup>Chapter VIII-International cooperation, art. 62 “General principles”.

protection of women victims of violence.

The immediate and adequate protection promoted by the convention, it is affirmed not only through the adoption of necessary national protection measures but also by individual Member States as well as by strengthening the cross-border recognition of protection orders which are adopted by the state of issue.

Along the same lines is the proposal for a Directive which places equal protection for women within the borders of the EU and the growth, mutual trust of judicial systems in individual Member States.

The regulatory framework, quite complex, precise from the past has the objectives of overcoming the obstacles of the application of Directive 2011/99/EU and of Regulation n. 606/2013. Of course, the more mature times from the past add to a more certain point where the proposal of the Directive and the accession of the EU in the Istanbul Convention are certainly steps forward but without exhaustively resolving the problem, trusting in a progressive reduction the phenomenon of abduction of minors at a level where the protection introduced by new instruments in favor to the female victim of mistreatment continues to be not a novelty but a continuation from the past and the minor victim indirectly towards an unsuccessful path that only the international legislator, of the EU and the national



one will be able to effectively protect towards a better future for children and women in difficulty.

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